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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO.

JACK BROCK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

I. DOES THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICT WITH THIS COURT'S RECENT RULING IN PAYTON v. NEW YORK, 445 U.S. 573 (1980) AND WITH U.S. V. JOHNSON, ____ U.S. ____, ___ S.Ct. ____, ___ L.Ed.2d ___, Case No.: 80-1608 (June 21, 1982)?

II. IN DECIDING THAT PRE-PAYTON LAW IN THE FIFTH CIRCUIT WAS EITHER CONTRARY TO PAYTON OR IN SUCH A STATE OF CONFUSION DID THE PANEL BELOW ENTIRELY DISREGARD THE OPINION IN U.S. v. CONGOTE, 656 F.2d 971 (5th Cir. 1978) WHICH SPECIFICALLY HELD THAT PRIOR TO PAYTON THE LAW IN THE FIFTH CIRCUIT WAS THAT ABSENT EXIGENT CIRCUMSTANCE, FEDERAL AGENTS NEEDED AN ARREST WARRANT TO ARREST A PERSON IN HIS OWN HOME?

III. ABSENT EXIGENT CIRCUMSTANCES DO FEDERAL DRUG ENFORCEMENT AGENTS HAVE THE RIGHT TO ENTER A PERSON'S DWELLING FOR THE PURPOSE OF ARRESTING HIM WITHOUT AN ARREST WARRANT?

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STATEMENT OF PRIOR PROCEEDINGS AND DISPOSITION

This Petition for writ of Certiorari arises out of an order by the Trial Judge granting Petitioner Brock's Motion to Suppress in part and denying the Motion to Suppress in part. (TT. 108, 109.) A notice of appeal from this order was filed by the Government on July 31, 1980 (R. 127.) On appeal, the Eleventh Circuit panel reversed. In an opinion by Fay, Circuit Judge, joined by Roney, Circuit Judge and Edenfield, District Judge, the Court held inter alia, that 1) the rule of Payton v. New York, 445 U.S. 573 (1980), holding unconstitutional warrantless entries into private dwellings absent exigent circumstances was not the law in the Fifth Circuit

prior to Payton as it was in most circuits, and 2) assuming arguendo that exigent circumstances were needed to justify the search, such circumstances were present in this case notwithstanding the Trial Judge's factual determination to the contrary.

The trial below was based on a six count indictment filed in the United States District Court for the Southern District of Florida charging Petitioner Jack Brock with conspiracy to distribute cocaine, possession with intent to distribute cocaine, and use of a communications facility in the commission of a felony. (R. 1.) Jack Brock and co-Defendant Elaine Marszalkowski filed a Motion to Suppress and Memorandum of Law in Support of Motion to Suppress. (R. 40-41.) Jack Brock also filed a Motion for Severance and a Memorandum of

Law in Support of Motion for Severance. (R. 53-54.) A hearing on the Motion to Suppress was heard by the magistrate over a five-day period (T. 1-647) after which the magistrate recommended denial (RI. 59-71.) Co-Defendant Jorge Congote was severed for trial and was tried and convicted February 12-15, 1980. He was sentenced on March 27, 1980 and his conviction was affirmed by the Eleventh Circuit on September 21, 1978. United States v. Congote, 656 F.2d 971 (5th Cir. 1981).

During the middle of the trial, the lower court granted the Motion to Suppress in part and denied it in part. (TT. 108-109.) Jack Brock was later severed out of the trial. (TT. 194.) The Government appealed and the panel reversed. United States v. Marszalkowski, 669 F.2d 665 (11th Cir. 1982).

Parties will be designated as follows:

The Petitioner will be referred to as "Jack Brock," "Mr. Brock," or "the Petitioner."

The Government will be referred to as "Respondent" or "Government."

References to the trial transcript will be made by use of the symbol "TT." References to the suppression hearing will be made with the symbol "T." References to the record will be made by the symbol "R" as indicated by the index prepared by the clerk. References to the additional material prepared by the Petitioner and made part of the record excerpts will be referred to by the symbol "RI" utilizing the pagination of the Petitioner.

STATEMENT ON JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on March 1, 1982. A timely joint suggestion of en banc consideration and Petition for Rehearing was denied on May 14, 1982, and this petition for certiorari was filed within 60 days of that time. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., 4 Amend.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE AND FACTS

On November 7, 1979, DEA agents, Charley Brown, Jr. and Agent Thompson, acting in an undercover capacity, went accompanied by an informant to defendant Loran Bennett's place of business. (TT. 50.) Agent Brown told Bennett that he wanted to buy large quantities of cocaine. Bennett replied that he had a supply of cocaine. (TT. 52.) Agent Thompson asked Bennett if Bennett could supply him with four to five kilograms of cocaine per month and Bennett replied that he could. (TT. 52.)

On November 8, 1979 the cocaine transaction was consummated by these individuals. Agent Brown met Mr. Bennett and another individual, later identified as defendant Stanford Mitchell, at a Ramada Inn, at which time the cocaine

was exchanged. (TT. 61-62.) Bennett and Mitchell were arrested at this time and then taken to the Drug Enforcement Administration Office. (TT. 65-66.) The arrest took place at approximately 9:30 p.m. (TT. 61.)

Bennett agreed to make a telephone call later that evening to his alleged source, later identified as Mr. Jack Brock. Prior to Bennett's phone call, the DEA had already dispatched two units to "sit on" the apartment which Bennett had identified as Brock's. (T. 163, TT. 81.) During the telephone conversation, the voice identified as Brock stated that he could have "three more tomorrow." (T. 31.) Mr. Brock did not say that he had cocaine at the apartment, nor was there any indication that any cocaine was in the apartment. (T. 32.) In addition, there was nothing in the

conversation to indicate that anyone else involved in the transaction was present in the apartment that evening. (T. 32.)

After the telephone conversation, agents Brown, Thompson and Perry accompanied Mr. Bennett to an area in Hialeah. (TT. 85.) Bennett had given them directions and pointed out the apartment he described as Brock's. (TT. 85.) The agent had previously sought and received authority from the Assistant United States Attorney to make an arrest of Mr. Brock. (T. 34.) The agents went to the apartment for the purpose of arresting Mr. Brock and not to effectuate a search. (T. 36, 311.) Agent Brown testified that he did not know who the lessee of this apartment was. (T. 37.) Agent Brown further stated that he had no reason to believe

that Brock knew the agents were coming that evening. (T. 36.) Agent Perry stated that he did not know anything about Brock and specifically did not know if Brock was a dangerous or violent man. (T. 321.) The agents had no information as to what was on the premises and no information as to the presence or absence of other persons involved in the transaction. (T. 322.)

The agents knocked on the front door and fell into the kitchen when Mr. Brock opened the door. (TT. 89; T. 337-338.) After Brock identified himself, he was arrested by the federal agents. (T. 316.) After entering the apartment the agents found some white powder, a cutting instrument and some currency. (T. 290-370.) Subsequent to Brock's arrest, the agents searched the apartment and

found other items including a scale and additional white powder. (T. 367-371.)

After arresting Mr. Brock and defendant Marszalkowski, the agents secured the apartment and proceeded to procure a search warrant. (T. 327, 374.) Agent Brown personally returned to the apartment the next day with a search warrant. (T. 41.) At that time additional cocaine, weapons, currency and paraphernelia were found in various rooms and locations in the apartment. (T. 329.)

REASONS FOR GRANTING THE WRIT

I. DOES THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICT WITH THIS COURT'S RECENT RULING IN PAYTON v. NEW YORK, 445 U.S. 573 (1980) AND WITH U.S. V. JOHNSON, ___ U.S. ___, ____ S.Ct. _____, _____ L.Ed.2d ____, Case No.: 80-1608 (June 21, 1982)?

This case raises the basic principles involved in the constitutionality of warrantless arrests in private dwellings. At the time this Court decided Payton v. New York, 445 U.S. 573 (1980), only seven United States Courts of Appeals had expressed an opinion on this issue with only five of those Courts

having ruled such arrests unconstitutional.

This Court further footnoted the ostensible lack of a clear expression on the point which existed in the Fifth Circuit. The Fifth Circuit subsequently clarified its position in U.S. v Congote, 656 F.2d 971 (5th Cir. 1981), as being in conformity with Payton.

The panel below incorrectly viewed Payton as "a new constitutional rule" and refused to apply it to the instant case. The panel asserted that Payton represented neither prior federal law nor prior Eleventh Circuit law (utilizing Fifth Circuit precedent as its own).

The panel's decision in this confusing area of law squarely and irreconcilably conflicts with the decision in Congote, supra, and its own forerunners as well as with decisions of this Court

in Payton and U.S. v. Johnson, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___, Case No. 80-1608 (June 21, 1982)

The panel in the decision below incorrectly held the Payton rule to be a novel constitutional standard and refused to apply it under the rubric of retroacticity. The court below discussed at length the impropriety of applying Payton retroactively, but that decision was clearly erroneous. This Court specifically held in Johnson, supra, that Payton should be applied retroactively to all convictions not yet final at the time the decision was rendered. This is such a case. The trial court in this case held that Payton should apply and ordered the evidence suppressed. The Eleventh Circuit improperly reversed that decision.

The decision below, representing the view of the Eleventh Circuit Court of Appeals, directly clashes on point with the decisions of this Court. The need for this Court's guidance merits a grant of certiorari to review and revise the judgment below.

II. IN DECIDING THAT PRE-PAYTON LAW IN THE FIFTH CIRCUIT WAS EITHER CONTRARY TO PAYTON OR IN SUCH A STATE OF CONFUSION DID THE PANEL BELOW ENTIRELY DISREGARD THE OPINION IN U.S. v. CONGOTE, 656 F.2d 971 (5th Cir. 1978) WHICH SPECIFICALLY HELD THAT PRIOR TO PAYTON THE LAW IN THE FIFTH CIRCUIT WAS THAT ABSENT EXIGENT CIRCUMSTANCE, FEDERAL AGENTS NEEDED AN ARREST WARRANT TO ARREST A PERSON IN HIS OWN HOME?

The judgment of the panel below is in direct and irreconcilable conflict with the precedent of the Eleventh Circuit found in United States v. Congote, 656 F.2d 971 (11th Cir. 1981), and United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978). Specifically, the panel's decision clashes with the above cases insofar as it holds that, prior to Payton v. New York, 445 U.S. 573 (1980), the Eleventh Circuit allowed warrantless

entry by government agents into private dwellings absent exigent circumstances. It now further clashes with the decision of this Court in Johnson, supra, which held that Payton should be applied retroactively to cases not final at the time of the Payton decision.

The conflict is especially apparent between the instant case and that of Congote, cases which both arise out of the same factual situation, and in fact, the same warrantless entry. Yet, the Eleventh Circuit announced diametrically opposite principles of law. In Congote, the Court initially found the warrantless entry to be a violation of Mr. Brock's Fourth Amendment rights but that Congote, a severed co-defendant, had no standing to assert that violation. The

Court curtailed the import of that decision by the subsequent insertion of footnote 6 which stated that any violations of Mr. Brock's rights were "merely assumptions," not to be construed as binding on Mr. Brock's appeal.

However, the subsequent correction of the Congote decision as to factual assumptions the Court made had no effect on the Court's application of pre-Payton precedent to that case. The Court stated:

> The application of Payton to the instant case [Congote] is not the retroactive application of a new rule. Indeed, in Payton the Court emphasized that it was simply clarifying what was already the law in most circuits.

656 F.2d at 974 n. 3 (Emphasis supplied)(citations omitted). This expression of what the Circuit's precedent was

prior to Payton directly contradicts what the panel in the case below believed pre-Payton law was when it stated:

> We therefore reject the trial judge's conclusion that Payton represented no more than a rearticulation of what already was established law in this circuit.

669 F.2d at 664 (Emphasis added).

The conflict is clear, direct and unequivocal. The panel opinion totally ignored the fact that in a previous decision, i.e. Congote, supra, it had precisely and unequivocally held that the law in the Eleventh Circuit was in conformity with the Payton decision. The panel instead resorted to attempted showings of confusion in the law, and incorrect applications of retroactivity. But, as Congote clearly announced, the law in the Fifth Circuit (and

therefore binding on the Eleventh) was and had been what Payton announced it to be.

The most recent and most comprehensive decision of the Eleventh Circuit regarding warrantless entries into private homes, prior to Payton, is United States v. Gaultney, 581 F.2d 1137 (5th Cir. 1978). In that well-reasoned opinion the Gaultney court opined:

> [I]t seems clear to us that, most assuredly, the Supreme Court [in Warden v. Hayden, 387 U.S. 294 (1967)] was saying that officers do not always have to have a warrant to enter a house for the arrest of a felon. If they have probable cause to arrest for a felony and the exigencies of the situation make it imperative that they proceed without waiting to obtain a warrant the arrest is not constitutionally invalid. This is certainly the law as it exists in the Fifth Circuit.

Id. at 1146 (Emphasis added).

Another demonstrably clear violation of well-settled precedent in the Eleventh Circuit is the panel's substitution of its own finding of fact for those of the trial court. On review of a motion to suppress, the appellate court must accept the trial court's finding of fact unless they are clearly erroneous. United States v. Llinas, 603 F.2d 506 (5th Cir. 1979); United States v. Juarez, 603 F.2d 267 (5th Cir. 1978); See also United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977); United States v. James, 528 F.2d 999 (5th Cir. 1976). No such determination was made by the panel. Yet it assumed facts not found in the record and substituted its own finding of exigent circumstances even though the trial court found to the contrary. (TT 108.) This is done even though under the panel's holding no such

circumstances need be shown to justify the entry and, perhaps, in recognition of just how unsturdy that holding is.

As illustrated, the panel's decision is blantantly irreconcilable with the decisions of Congote, Gaultney, and Llinas. To allow such a conflict to continue can do only violence to stare decises and interrupts the logical flow of precedent on this point. Accordingly, certiorari must be granted to resolve this conflict through review of the panel's decision below.

III. ABSENT EXIGENT CIRCUMSTANCES DO FEDERAL DRUG ENFORCEMENT AGENTS HAVE THE RIGHT TO ENTER A PERSON'S DWELLING FOR THE PURPOSE OF ARRESTING HIM WITHOUT AN ARREST WARRANT?

The principles and proper application of Fourth Amendment law were clearly not applied by the panel in the decision below. Instead, the judgment blatantly differs with general Supreme Court authority. Moreover, it specifically and squarely clashes with Payton. The judgment below suggests, perhaps, that Payton is but a swift swing of the pendulum and does not require strict adherence.

> This hard-and-fast rule, founded on erroneous assumptions concerning the intrusiveness of home arrest entries, finds little or no support in common law or in the text and history of the Fourth Amendment. . . .

> Today's decision virtually ignores these centuries of common-law development and distorts the historical meaning of the Fourth Amendment. . . .

Payton, at 603, 604 (White, J. dissenting).

It would seem apparent that Payton law should have been applied to the instant case. The trial judge did apply Payton standards to Mr. Brock's motion to suppress and consequently found that the DEA agents had illegally entered and arrested Mr. Brock. The panel below subsequently reversed the trial judge's application of Payton's standard in ruling on the defendant's motion to suppress. As discussed in the previous section, retroactive application of law is now the issue at hand in the instant case. Johnson, supra.

At stake is the subtle erosion of Payton's import. Payton involved two

daytime, "routine felony arrests," arrests of a suspected murderer and of a suspected armed robber. Contrasted with this is Mr. Brock who, unlike these two routine felons, was arrested at night and, moreover, was not known by the arresting agents to be a violent or dangerous man (T. 321.)

Furthermore, Payton invalidated statutory authority for police activity. Such authority quite obviously holds more weight than the supposed "good faith" reliance attributed to the DEA agents by the panel. Certainly the panel cannot be referring to good faith reliance of the Federl Rules of Criminal Procedure which should have governed the arrest process in the instant case.

> If the circumstances make it reasonable to dispense with a written affidavit, a federal magistrate may issue a warrant based upon sworn oral testimony

> communicated by telephone or other appropriate means.

FED.R.CRIM.P. 41 (c)(2)(a). This rule was amended in 1977 to encourage the use of warrants and to make it administratively feasible to obtain one when quickly needed.

Assuming arguendo that time was a factor in the case at hand, a phone call to a federal magistrate still could easily have been placed immediately after agent Brown's conversation with Assistant U.S. Attorney Donald Graham who, while advising Brown to arrest Mr. Brock, did not suggest Brown procure an arrest warrant (T. 34); or during the drive to the apartment complex, where the agents went for the sole purpose of arresting Mr. Brock and not for the purpose of effecting a search (T. 36, 311);

or, finally, upon arrival at the apartment complex, where two units had previously been dispatched to "sit on" the apartment. (T. 163, TT. 81) Moreover, the trial judge found that exigent circumstances were not present and a quick arrest not necessary. The Congote Court assumed the same finding of fact. Agent Brown stated that he had no reason to believe that Jack Brock knew agents were coming that evening. (T. 36.) Indeed, the record is replete with testimony that vitiates any exigent circumstances under any standard.

No circumstances present in the record would excuse the necessity of securing a warrant. Yet, the panel is willing to excuse the improper behavior of the DEA agents in the present case. In so doing the panel has refused to apply Fourth Amendment principles to a

fact pattern of which such application has been mandated by this Court. Therefore, the decision below irreconcilably conflicts with Payton and Johnson and, consequently, erodes the import of its legal principles.

The panel below has thus departed from the accepted and usual course of judicial proceedings as to compel a petition for certiorari to review its decision.

CONCLUSION

For the foregoing reasons, it is urged that the Court accept jurisdiction of this cause and grant the Petition for Writ of Certiorari.

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By: _____
THEODORE KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Petitioner's Writ for Certiorari was mailed this 9th day of ~~June,~~ July 1982, to: United States Solicitor General, Washington, D.C.

By: THEODORE KLEIN
THEODORE KLEIN